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FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

Jan 8 1990
Markus B. Zimmer,
Clerk
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

MONTE C. HANSEN, LINDA HANSEN, MONTE T. HANSEN, DUANE JESS HUMPHRIES, CAROL RAVARINO, RICHARD RAVARINO, Plaintiffs, vs. SEA RAY BOATS, INC., a Tennessee corporation; BRUNSWICK CORPORATION, a Delaware corporation; SOUTHWEST MARINE, an Arizona corporation; PROFESSIONAL MARINER, a California corporation; and NEWMARK PRODUCTS, INC., a California corporation, Defendants.	ORDER Civil No. 88-C-708G

On December 6, 1989, the Court heard arguments on the defendant's motions for summary judgment on the claims of Linda Hansen and also on defendant Southwest Marine's motion to compel. Plaintiff was represented by Anthony M. Thurber, defendant Sea Ray was represented by Donald L. Dalton, defendant Southwest Marine was represented by Todd S. Winegar, defendant Professional Mariner was represented by Glen T. Hale, and defendant Newmark did not appear.

The Court, after hearing argument and being advised in the merits, hereby rules as follows:

1. The Court hereby grants the defendants' motion for summary judgment on the claims of Linda Hansen unless Linda Hansen files, on or before December 29, a request for certification of the question to the Utah Supreme Court. If the plaintiff Linda Hansen makes such a filing including appropriate documents to make the certification to the Utah Supreme Court, this Court will schedule a hearing on whether to request such certification.

DATED this 4th day of January, 1990.

BY THE COURT:

/s/ J. Thomas Greene
Honorable J. Thomas Greene
U.S. District Judge

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FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

Oct 30 1990
Markus B. Zimmer,
Clerk
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

MONTE C. HANSEN, LINDA HANSEN, MONTE T. HANSEN, DUANE JESS HUMPHRIES, CAROL RAVARINO, and RICHARD RAVARINO, Plaintiffs, vs. SEA RAY BOATS, INC., an Arizona corporation, SOUTHWEST MARINE, an Arizona corporation, and PROFESSIONAL MARINER, a California corporation; and NEWMARK PRODUCTS, INC., a California corporation, Defendants.	ORDER OF CERTIFICATION Civil No. 88-C-708G

TO: Utah Supreme Court

The United States District Court for the District of Utah, on its own motion, pursuant to Rule 41, Utah Rules of Appellate Procedure, requests the Utah Supreme Court to answer the following questions of Utah law:

1. Whether a person not actually threatened with bodily harm, who incorrectly but reasonably believes he or she is actually threatened with bodily harm, has a claim for negligent infliction of emotional distress that satisfies the "threat of harm" requirement of Section 313 of the Restatement (Second) of Torts, as adopted by the Utah Supreme Court in Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

2. Whether a person who witnesses others receiving bodily harm and fears for his or her own safety, although that person does not comprehend the source of the harm and therefore does not fear harm from that particular source, has a claim for negligent infliction of emotional distress that satisfies the "fear for one's own safety" requirement of Section 313 of the Restatement (Second) of Torts, as adopted by the Utah Supreme Court in Johnson v. Rogers.

3. If the answer to question 1 is no, would the answer be yes if the person described therein witnesses an immediate family member threatened with actual bodily harm.

This is an action by Plaintiffs Monte T. Hansen, Duane Jess Humphries and Carol Ravarino for personal injuries they claim to have sustained when they received an electrical shock in the water behind their boat at Lake Powell. Plaintiff Richard Ravarino, though never in the water himself, claims to have received an electrical shock while standing on the fiberglass

swim platform on the back of the boat and assisting Duane Jess Humphries from the water into the boat. Plaintiff Linda K. Hansen did not enter the water; come into contact with any of the four plaintiffs who claim to have received an electrical shock; or receive an electrical shock herself. She witnessed the three plaintiffs named above receiving an electrical shock, and one of those plaintiffs, Monte T. Hansen, is her son. Mrs. Hansen claims that at the time she witnessed the harm to her son, she experienced a general, "global" kind of fear, although she was not in fear herself of drowning or receiving an electrical shock. Mrs. Hansen claims damages for negligent infliction of emotional distress resulting from witnessing the harm to her son.

Defendants moved for summary judgment on the claim of Mrs. Hansen claiming that under the Utah Supreme Court's decision, Johnson v. Rogers, Mrs. Hansen fails to state a claim for negligent infliction of emotional distress because she was never in danger herself of drowning or receiving an electrical shock. Mrs. Hansen claims that the circumstances of her case bring her claim for negligent infliction of emotional distress within the parameters of Section 313 of the Restatement (Second) of Torts, as adopted by the Utah Supreme Court in Johnson v. Rogers.

This Court has determined that Johnson v. Rogers does not answer the legal questions raised by Mrs. Hansen's claim and that there appears to be no other controlling Utah law on the subject. The Court has also determined that the legal questions stated above are controlling questions of law as to Mrs. Hansen's claim. Those questions were first framed by the Court at the three hearings held by the Court on defendants' motion for summary judgment. The questions were then reduced to writing, in the form of a proposed Order of Certification, through a joint effort of counsel for all of the parties to this action. That proposed Order was adopted by the Court and entered on the date set forth below.

DATED this 30th day of October, 1990.

BY THE COURT:

/s/ J. Thomas Greene
Honorable J. Thomas Greene
U.S. District Judge

APPROVED AS TO FORM:

/s/ Anthony M. Thurber
Anthony M. Thurber
Attorney for Plaintiffs

/s/ Arthur Lee Bishop
Arthur Lee Bishop
Attorney for Plaintiffs

DUNN & DUNN

/s/ Glen T. Hale
Glen T. Hale
Attorneys for Defendant
Professional Mariner, Inc.

C 1

FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

Jun 1 1992
Markus B. Zimmer,
Clerk
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH - CENTRAL DIVISION

MONTE C. HANSEN, LINDA K. HANSEN, MONTE T. HANSEN, DUANE JESS HUMPHRIES, CAROL RAVARINO, and RICHARD RAVARINO, Plaintiffs, vs. SEA RAY BOATS, INC., an Arizona Corporation, SOUTHWEST MARINE, an Arizona Corporation, PROFESSIONAL MARINER, a California Corporation, and NEWMARK PRODUCTS, INC., a California Corporation, Defendants.	ORDER Civil No. 88-C-708G

On April 17, 1992 this Court heard extensive oral argument on various motions filed by plaintiffs and defendants in the above-captioned case. Plaintiffs were represented by Anthony M. Thurber. Defendant Sea Ray Boats, Inc., was represented by Donald L. Dalton. Defendant Newmark Products, Inc., was represented by Dennis R. James and Mitchel T. Rice. Defendant Professional Mariner, Inc. was represented by Glen T. Hale and Tim Dalton Dunn. The Court took all matters under advisement. Now, being fully advised the Court makes the following rulings.

1. Defendants' Motion for Summary Judgment against Linda K. Hansen is Granted

Defendants' motions for summary judgment against plaintiff Linda K. Hansen initially came on for hearing before the Court on December 6, 1989. In an Amended Order entered on January 10, 1990, the Court granted the motion. However, the Court agreed to withhold entry of summary judgment if plaintiffs sought certification of the legal issues raised by Mrs. Hansen's claim to the Utah Supreme Court.

On October 30, 1990, the Court entered an Order of Certification to the Utah Supreme Court ("Certification Order"). The Certification Order presented three questions of Utah law which, if answered in the affirmative would have had the effect of changing this Court's ruling on Mrs. Hansen's claims. As required by Rule 41 of the Utah Rules of Appellate Procedure, the Certification Order contained a statement of all facts relevant to determination of the three questions certified. The Order had previously been approved as to form by counsel for all the parties to this action.

On March 11, 1990, the Utah Supreme Court filed its answer to the three certified questions. The Supreme Court

answered each of the questions in the negative, thereby barring all claims alleged by Mrs. Hansen. Counsel for plaintiff now alleges that the facts stated in the Certification Order were incomplete and argues that there does exist a fact dispute regarding Mrs. Hansen's alleged presence in the "zone of danger." This Court finds the Mrs. Hansen's claims [sic] are governed by the facts as certified. Accordingly, defendants' motions for summary judgment against Linda K. Hansen are granted and Mrs. Hansen's claims are dismissed with prejudice.

IT IS SO ORDERED.

DATED: May 29, 1992

/s/ J. Thomas Greene
J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

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FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

Nov 30 1992
Markus B. Zimmer,
Clerk
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

MONTE C. HANSEN, LINDA K. HANSEN, MONTE T. HANSEN, DUANE JESS HUMPHRIES, CAROL RAVARINO, RICHARD RAVARINO, Plaintiffs, vs. SEA RAY BOATS, INC., SOUTHWEST MARINE, PROFESSIONAL MARINER, NEWMARK PRODUCTS, INC., Defendants.	ORDER DENYING LINDA HANSEN'S MOTION TO ALTER OR AMEND JUDGMENT Civil No. 88-C-708G Honorable J. Thomas Greene, Jr.

Plaintiff Linda K. Hansen's motion to alter or amend the "Order Granting Defendants' Motions for Summary Judgment

Against Plaintiff Linda K. Hansen" came on for hearing before the Court on September 1, 1992. Plaintiffs were represented by Anthony M. Thurber, and defendant Sea Ray Boats, Inc. was represented by Donald L. Dalton. The Court heard the arguments of counsel and having previously reviewed the memoranda of the parties and other materials bearing on this motion, being therefore fully advised, orders that the same is DENIED.

DATED this 25th day of November, 1992.

BY THE COURT:

/s/ J. Thomas Greene
Honorable J. Thomas Greene
U.S. District Judge

FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

Jul 01 1994
Markus B. Zimmer,
Clerk
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH - CENTRAL DIVISION

MONTE C. HANSEN, MONTE T. HANSEN, DUANE JESS HUMPHRIES, CAROL RAVARINO, and RICHARD RAVARINO, Plaintiffs, vs. SEA RAY BOATS, INC. Defendant.	ORDER Civil No. 88-C-708G

This matter came before the court on June 29, 1994 on the Hansen plaintiffs' Motion to Reconsider. The Hansen

plaintiffs were represented by David McPhie. [D]efendant Sea Ray was represented by Donald Dalton.

After hearing oral argument and reviewing the matter, this court now issues the following Order denying all three motions.

I. MOTION FOR RECONSIDERATION

Plaintiff Linda Hansen urges this court to reinstate her claim for negligent infliction of emotional distress. In support of her motion, plaintiff argues that this court has never made a determination that she was not in the "zone of danger."

Having reviewed the facts of this case, this court reaffirms its finding that plaintiff Linda Hansen was not in actual danger of harm, even though she may have believed that she was. This matter was certified to the Supreme Court of Utah after such a factual determination had been made by this court. In granting summary judgment conditionally before the certification, by Order dated December 22, 1989, and again after the opinion of the Utah court was rendered, by Order dated June 1, 1992, this court determined on the basis of all facts before it that plaintiff Linda Hansen was not actually within the "zone of danger" as required by Johnson v. Rogers, 763 Pl2d 771 (Utah 1988). In the certified case of Hansen v. Sea Ray Boats, 830 P.2d 236 (Utah 1991), the Utah Supreme Court held that when a person is not in fact within the "zone of danger," emotional distress to the contrary notwithstanding, there is no cause of action for infliction of such emotional distress. Accordingly, plaintiff Linda Hansen's Motion for Reconsideration is denied.

Based upon the foregoing, it is hereby

ORDERED, that plaintiffs' Motion for Reconsideration is Denied.

DATED: July 1, 1994.

/s/ J. Thomas Green
J. THOMAS GREENE
UNITED STATES DISTRICT
JUDGE

F I L E D

FILED
United States Court of Appeals
Tenth Circuit

FEB 20 1997

PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LINDA HANSEN, MONTE T. HANSEN,

Plaintiffs-Appellants,

v.

SEA RAY BOATS, INC.,

Defendant-Appellee.

MONTE C. HANSEN, LINDA K. HANSEN,

Plaintiff-Appellee,

No. 94-4252
(D.C. No. 88-CV-708-G)
(D. Utah)

MONTE T. HANSEN,
DUANE JESS HUMPHRIES,
CAROL RAVARINO,
RICHARD RAVARINO,

Plaintiffs,

v.

SEA RAY BOATS, INC.,

Defendant-Appellant,

BRUNSWICK CORP., a Delaware corporation;
SOUTHWEST MARINE, an Arizona corporation;
PROFESSIONAL MARINER, a California corporation;
NEWMARK PRODUCTS,

Defendants.

No. 95-4190
(D.C. No. 88-CV-708-G
(D. Utah)

ORDER AND JUDGMENT

Before TACHA, EBEL, and BRISCOE, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

In 1987, plaintiffs Monte C. and Linda K. Hansen purchased a twenty-five foot cruiser manufactured by defendant Sea Ray Boats, Inc. On April 1, 1988, the Hansens' son, Monte T. Hansen, and others sustained injuries from in-water electrical shock, caused by a faulty grounding system in the boat. All three Hansens, and other plaintiffs who are not parties to this appeal, brought suit in the United States District Court for the District of Utah. Mrs. Hansen, who was on the boat and witnessed her son begin to drown because of the electrical current, brought a claim for negligent infliction of emotional distress. Her son brought a claim for negligence, and the Hansens jointly brought claims for breach of warranty.

The district court granted Sea Ray's motion for summary judgment on Mrs. Hansen's claim after the Utah Supreme Court answered questions certified to it regarding the scope of a negligent infliction of emotional distress cause of action under Utah law. Mrs. Hansen appeals this judgment.

Linda Hansen's Claim of Negligent Infliction of Emotional Distress.

In 1988, the Supreme Court of Utah held that a cause of action could be maintained in Utah for negligent infliction of emotional distress. See Johnson v. Rogers, 763 P.2d 771, 782, 785 (Utah 1988). A majority of the court agreed that the test for determining liability for the tort would be the standards as set forth in section 313 of the Restatement (Second) of Torts and as explained in the accompanying comments. See id. at 785 (Zimmerman, J., joined by three other justices, concurring in part).

The Restatement provides:

(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting

illness or bodily harm if the actor

(a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and

(b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

(2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

Restatement (Second) of Torts § 313 (1965) (emphasis added). This standard is commonly referred to as the "zone of danger" test. See Johnson, 763 P.2d at 779. The issue on appeal is whether, at the time the order was certified to the Utah Supreme Court, there existed a disputed issue of material fact regarding Mrs. Hansen's exposure to "an unreasonable risk of bodily harm," see Restatement (Second) of Torts § 313 & cmt. d (1965), or, put another way, whether she was in the zone of danger. The parties agreed in the district court that the test was a dual one: a putative plaintiff must have feared for his or her own safety, and that fear must have been based on actual danger. [S]ee generally Restatement (Second) of Torts § 313 & cmt. d (1965).

During the hearing on Sea Rays' motion for summary judgment on Mrs. Hansen's claim, the court focused on two questions: (1) would the fact that Mrs. Hansen was watching her son in a hazardous situation, as opposed to observing a stranger in similar peril, alter the determination of whether she was in the zone of danger because of her possible impulse to rescue her son? and (2) while Mrs. Hansen may not have been in actual danger, what effect would there be from her genuine, albeit

incorrect, fear that she was? (transcript of certification order hearing).

After listening to the arguments about whether the facts established Mrs. Hansen's presence in the zone of danger, the court informed the parties that it would grant Sea Ray's motion for summary judgment unless Mrs. Hansen wished to file a motion for certification to the Utah Supreme Court focusing on the concerns developed at the hearing and mentioned above. The parties jointly requested certification. With the approval of both counsel for the Hansens and counsel for defendants as to form, the district court certified the following questions to the Utah Supreme Court:

1. Whether a person not actually threatened with bodily harm, who incorrectly but reasonably believes he or she is actually threatened with bodily harm, has a claim for negligent infliction of emotional distress that satisfies the "threat of harm" requirement of Section 313 of the Restatement (Second) of Torts, as adopted by the Utah Supreme Court in Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

2. Whether a person who witnesses others receiving bodily harm and fears for his or her own safety, although that person does not comprehend the source of the harm and therefore does not fear harm from that particular source, has a claim for negligent infliction of emotional distress that satisfies the "fear for one's own safety" requirement of Section 313 of the Restatement (Second) of Torts, as adopted by the Utah Supreme Court in Johnson v. Rogers.

3. If the answer to question 1 is no, would the answer be yes if the person described therein witnesses an immediate family member threatened with actual bodily harm.

When the Utah Supreme Court answered all three questions in

the negative, the district court entered summary judgment for Sea Ray.

On appeal, Mrs. Hansen contends the questions of law certified to the Utah Supreme Court were based on a hypothetical set of facts that "[t]here has never been a bona fide finding by the lower court that Mrs. Hansen never feared or was threatened by the electrical current once it was determined to have been the source of harm to those who received electrical shocks." Mrs. Hansen argues that issues remain regarding her fear for her own safety, and that the issue of whether she was threatened with harm "fell into a procedural void." The upshot of the certification proceeding, according to Mrs. Hansen, was to transform hypothetical facts used for the purpose of eliciting a legal opinion from the Utah Supreme Court into actual undisputed facts supporting the district court's legal conclusion that Mrs. Hansen was not in the zone of danger.

We view this appeal as asking us to decide whether the facts, as framed in the certification order, were hypothetical only, or whether they had already been decided by the district court prior to the certification. On review of the certification order, we conclude that the only statement Mrs. Hansen could logically take exception to is the first phrase of the first question: "[w]hether a person not actually threatened with bodily harm, who incorrectly but reasonably believes he or she is actually threatened with bodily harm, has a claim...." This wording established for the Utah Supreme Court that Mrs. Hansen, herself, was not in the zone of danger. The wording of the second question takes into account the fact that Mrs. Hansen feared for her own safety, a finding necessary to her recovery, but did not comprehend the source of the danger (because the agent of the danger was not identified to be electricity until later). This

question has no negative connotations for Mrs. Hansen. It simply reflects the apparent state of the record.[1] The third question asks whether a relationship with the actual victim is important in determining the zone of danger, thus giving the Utah court the opportunity to broaden its law beyond that established in Johnson and, arguably, giving Mrs. Hansen an additional basis for her claim. So, we focus on whether there was a genuine dispute as to Mrs. Hansen's actual exposure to bodily harm at the time the certification order was prepared, or whether the district court had resolved that issue as a matter of law prior to certification.

Our review of the record, particularly the transcripts of the summary judgment hearing and the certification order hearing, convinces us that the district court had decided that Mrs. Hansen was not threatened by bodily harm at the time of the incident and was thus not in the zone of danger. Mrs. Hansen's argument that the district court's summary judgment order was based only on hypothetical facts is, therefore, without merit.

At the outset, the parties agreed that the court would have to decide the meaning of the zone of danger under the circumstances presented. During the course of the summary judgment hearing the court made the following observations:

> "Suppose I were to determine as I think I easily could at this point that there was a reasonable basis for fear. Is it fatal that in fact there was no danger?"
>
> "And here it is not alleged or even claimed that there was physical danger by simply being on the boat.... I'm not sure that that's what [plaintiff's counsel] agrees to

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[1] We note that the record on appeal does not contain all of the materials that were before the district court when it ruled on the summary judgment motion.

but I suppose that's the case."

Turning to the fact that Mrs. Hansen's son was a direct victim, the court stated:

> "Well the only real question that is, the court is in doubt on is whether the relationship has any bearing upon actual danger."

The court also observed:

> The thing that's just giving to me a little bit of interest, in the circumstances of an accident that's really traumatic, a person who is intimately connected with the person in the danger might very well do an irrational thing as jumping out of a window in an earthquake and you would be saying, everything would be just perfectly fine if you just stay right there under the table.
>
> You're not in any danger if you stay there so you're not in the zone of danger but when that happens a person objectively might do some irrational thing if they were related to the person and I don't know whether that has a bearing on determining whether a person, though otherwise out of danger is in danger because of her relationship.

In the certification order hearing, the court made the following observations:

> "Well, I think you both agree don't you that she was, in fact, was not in the zone of danger?"

In trying to concisely frame the question to be certified, it is clear that the court was no longer concerned about actual threat of bodily harm. The court stated:

"Well the whole thing we're trying to do here as I have conceived it is to test whether a person's reasonable belief and fear based upon that reasonable belief coupled with witnessing a family member, a close family member who clearly is in danger, whether that is enough, that's it, isn't it?"

And again, the court's thinking was clearly indicated:

That's the only thing we're trying to do. We're not trying to determine what is the zone of danger or whether her fear was reasonable, those are – if the Supreme Court of Utah should say, a person who is not in the zone of danger, whatever that is, has reasonable fear and it involves a family member, a close family member and if the Supreme Court of Utah should say, that isn't enough, that's that.

If they should say that is enough then we have some question of fact to try, was it reasonable for her to be in fear, was she really in fear, was – and the reasonableness of the whole thing, I think there would be questions of fact but I don't think we need to implicate the Supreme Court of Utah in any of that.

The district court clearly had decided that Mrs. Hansen was not in the zone of danger:

"I think that's what has to be stated to the Supreme Court. She is wrong, she was not in the zone of danger."

"Well I think the questions as have been suggested by [defense counsel] ought to be combined into just one question. For instance the first question doesn't have the element that I think it has to have. . . [w]hether a person who is not in the zone of danger –"

> "[H]as there ever been a case that addressed the question of whether a person believes, subjectively believes they're in the zone of danger but wrongly so?"

Finally, the court summarized the issue:

> "Well I'm interested in the fundamental question whether a person who isn't in the zone of danger who believes that they are and has a reasonable fear and there is a family member involved has a cause of action . . . . If you want to certify something like that and can frame it together fine, if you don't, let's get on with it, I'll rule on the thing."

While it would have been preferable for the district court to make an explicit finding that Mrs. Hansen was not in the zone of danger as a matter of law before the certification, we conclude it is clear from the district court's remarks that the court was of that opinion. The questions were certified for guidance in situations where someone might mistakenly believe he was in danger but was actually safe, and in situations where the actual victim was closely related to the claimant. Given the observations of the court in the record, we conclude there was no dispute of material fact regarding Mrs. Hansen's presence in the zone of danger given the state of the law in Utah at the time and absent any expansion of that law by the Utah Supreme Court. Thus, the wording of the certification order with regard to the first question was not merely a hypothetical, but was based on the decision of the district court that Mrs. Hansen was not actually threatened with physical harm. Once the Utah Supreme Court answered the questions in the certification order in the negative, Mrs. Hansen had no claim remaining, and the entry of

summary judgment by the district court was proper.[2]

As we have noted, we do not have the complete summary judgment record. The Parties in the district court refer to Mrs. Hansen's deposition but it is not in our record, and the only evidence we have going to Mrs. Hansen's claim is her affidavit. To the extent that Mrs. Hansen is asking us to review the propriety of the district court's determination regarding her presence in the zone of danger, we are unable to do so without a complete record. See Ewers v. Board of County Comm'rs, 802 F.2d 1242, 1250 (10th Cir. 1986) (unable to review claim because evidentiary matter considered and relied on by district court are not included in record on appeal). When reviewing the entry of summary judgment, we perform the same analysis as the district court, determining whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with

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[2] Our conclusion that the district court had made a factual determination regarding the question of Mrs. Hansen's presence in the zone of danger is reinforced by the court's later order denying the Hansens' motion to reconsider the summary judgment. There the court stated:

> Plaintiff Linda Hansen urges this court to reinstate her claim for negligent infliction of emotional distress. In support of her motion, plaintiff argues that this court has never made a determination that she was not in the "zone of danger."
>
> Having reviewed the facts of this case, this court reaffirms its finding that plaintiff Linda Hansen was not in actual danger of harm, even though she may have believed that she was. This matter was certified to the Supreme Court of Utah after such a factual determination had been made by this court. In granting summary judgment conditionally before the certification, by Order dated December 22, 1989, and again after the opinion of the Utah court was rendered, by Order dated June 1, 1992, this court determined on the basis of all facts before it that plaintiff Linda Hansen was not actually within the "zone of danger" as required by Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In the absence of a complete record, we are unable to conduct a de novo review and must, therefore, affirm the conclusion of the district court that Mrs. Hansen was not actually threatened with bodily harm, and that summary judgment for Sea Ray was proper. See Deines v. Vermeer Mfg. Co., 969 F.2d 977, 979-80 (10th Cir. 1992).

The judgments of the district court in cases No. 94-4252 and No. 95-4190 are AFFIRMED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

-o0o-

MONTE C. HANSEN, et al.,	
Plaintiffs,	Case No. C88-708
vs.	Salt Lake City, Utah Date: December 6, 1989 Time: 2:00 p.m.
Sea Ray Boats, et al.,	
Defendants.	

REPORTER'S TRANSCRIPT

BEFORE: THE HONORABLE J. THOMAS GREENE

APPEARANCES OF COUNSEL:

For the Plaintiff:	TONY THURBER, ESQ.
For the Defendant:	DONALD L. DALTON, ESQ. GLEN T. HALE, ESQ. And TODD S. WINEGAR, ESQ.
Court Reporter:	REEVE M. BUTLER, RPR Official Court Reporter Rm. 224 Federal Bldg. 350 S. Main Street Salt Lake City, Utah 84101

MR. THURBER: Well by hindsight we can see as long as she didn't go in the water or reach in the water or touch somebody in the water say in an effort to bring them onto the boat, she wouldn't be hurt by electricity but going in the water and rescue attempt, reaching in the water or even touching a person that was in the water we now know by hindsight would present and would have presented a danger to her. It was unrecognized at the time.

....

THE COURT: I was going to say this that I would be inclined to grant the motion for summary judgment unless Mr. Thurber wants to file a motion for certification to the Supreme Court in full compliance with the Appellate Rules of the Utah Supreme Court and do that as a motion here and then we would argue whether it is appropriate and whether you have made a sufficient showing to actually certify it.

....

THE COURT: [A]nd I suppose the unique thing that I would be interested in if it's not already ruled upon and not something that is maybe an illusory issue would be whether a person not actually in danger may be said to be in danger because of her intimate relationship with the person who was in danger and thereby satisfy that element of the zone of danger test under the conception of things of the Utah Supreme Court.

....

THE COURT: I wonder if this would be a good case to certify to the Supreme Court for determination of where the zone of danger cuts off.

IN THE SUPREME COURT OF THE STATE OF UTAH

* * *

MONTE C. HANSEN, et al., et al.,	)	
Plaintiffs,	)	
-v-	)	Case No. 900512
SEA RAY BOATS, INC., et al.,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT OF PROCEEDING
SALT LAKE CITY, UTAH
MARCH 11, 1992

MR. DALTON: What I'm telling you, though, is that Judge Greene resolved that for you. He said, she is not in danger, actually.

JUSTICE ZIMMERMAN: But he said she reasonably believes she was in danger.

MR. DALTON: She thought she was but she was wrong. And I'm telling you that under the Restatement, that question is answered in the negative. I mean, her perception of the threat of harm is totally irrelevant to your recovery under 313(2). You have to be in danger.

Todd S. Winegar, 3521
Karra J. Porter, 5223
CHRISTENSEN, JENSEN &
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FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

Sep 28 1989
Markus B. Zimmer,
Clerk
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

MONTE C. HANSEN, LINDA HANSEN, MONTE T. HANSEN, DUANE JESS HUMPHRIES, CAROL RAVARINO, RICHARD RAVARINO, Plaintiffs, vs. SEA RAY BOATS, INC., a Tennessee corporation; BRUNSWICK CORPORATION, a Delaware corporation; SOUTHWEST MARINE, an Arizona corporation; PROFESSIONAL MARINER, a California corporation, Defendants.	**MOTION FOR SUMMARY JUDGMENT ON CLAIMS OF LINDA HANSEN** Civil No. 88-C-708G

Defendant Southwest Marine, by and through its counsel of record, hereby moves the Court to grant summary judgment in favor of said defendant, and against plaintiff Linda Hansen in the above-captioned matter. This motion is based upon the grounds that Linda Hansen has failed as a matter of law to establish the elements of a cause of action for negligent infliction of emotional distress. Specifically, Ms. Hansen was never physically threatened by the defendants' alleged conduct, and never feared for her own safety. Furthermore, Ms. Hansen is not related to plaintiffs Duane J. Humphries or Carol Ravarino, and therefore cannot recover for distress allegedly received while witnessing Humphries' and Ravarino's alleged injuries.

The grounds upon which this motion are based are further set forth in the accompanying Memorandum of Points and Authorities.

DATED this 25th day of September, 1989.

CHRISTENSEN, JENSEN &
POWELL, P.C.

/s/ Karra J. Porter
Todd S. Winegar
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FILED
UNITED STATES
DISTRICT COURT
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Sep 28 1989
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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

MONTE C. HANSEN, LINDA HANSEN, MONTE T. HANSEN, DUANE JESS HUMPHRIES, CAROL RAVARINO, RICHARD RAVARINO, Plaintiffs, vs. SEA RAY BOATS, INC., a Tennessee corporation; BRUNSWICK CORPORATION, a Delaware corporation; SOUTHWEST MARINE, an Arizona corporation; PROFESSIONAL MARINER, a California corporation; and NEWMARK PRODUCTS, INC., a California corporation, Defendants.	**MEMORANDUM IN SUPPORT OF DEFENDANT SOUTHWEST MARINE'S MOTION FOR SUMMARY JUDGMENT ON CLAIMS OF LINDA HANSEN** Civil No. 88-C-708G

Defendant Southwest Marine, by and through its counsel of record, hereby submits the following Memorandum of Points and Authorities in support of its Motion for Summary Judgment to dispose of claims brought by plaintiff Linda Hansen.

BACKGROUND

1. This action arises out of an electrical shock allegedly received by plaintiffs Monte T. Hansen, Duane J. Humphries and Carol Ravarino while near a boat manufactured by defendant Sea Ray, sold by defendant Southwest Marine, and containing electrical parts manufactured or sold by defendants Professional Mariner and Newmark Products, Inc.

2. Plaintiff Linda Hansen's claims (which are the subject of this motion) are for negligent infliction of emotional distress allegedly resulting from witnessing her son and the two others receiving electrical shock.

3. Plaintiff Linda Hansen is the mother of plaintiff Monte T. Hansen. Ms. Hansen is not related, by blood or marriage, to either plaintiff Duane J. Humphries or plaintiff Carol Ravarino.

4. Monte T. Hansen, Humphries and Ravarino allegedly received an electrical shock when they were in the water behind the Hansen's boat. During the time of the alleged shock, Linda Hansen was safely in the boat, and it is not alleged that she was in the water with the other three plaintiffs.

FACTS NECESSARY FOR SUMMARY JUDGMENT

Ms. Hansen admits that she was not in danger of receiving an electrical shock, and that she did not fear for her own safety:

Q. I take it that you were never shocked, is that right?

A. No. I was not in the water.

Q. And I take it –

MR. DUNN: And you were not shocked?

THE WITNESS: No. I was not shocked.

Q. (BY MR. WINEGAR) I take it that you never were in fear of being shocked?

A. No.

(Deposition of Linda Hansen, p. 54.)

I. A CAUSE OF ACTION FOR NEGLIGENT INFL[I]CTION OF EMOTIONAL DISTRESS DOES NOT EXIST WHEN THE PLAINTIFF IS NOT ENDANGERED BY THE DEFENDANT'S CONDUCT.

Plaintiff Linda Hansen admits that she was not electrically shocked at the time of the accident, nor at any time did she fear being shocked. (Depo. of Linda K. Hansen, p. 54.) Recovery for negligent infliction of emotional distress is not allowed where plaintiff is not endangered by the defendant's conduct. Consequently, there can be no such claim in this case.

In 1988, the Utah Supreme Court first allowed recovery for negligent infliction of emotional distress. Johnson v. Rogers. 763 P.2d 771 (Utah 1988). The majority, through Justice Zimmerman, endorsed the "zone of danger" rule set forth in the Restatement (Second) of Torts § 313. That rule allows recovery for unintentionally caused emotional distress that results in bodily harm. It stresses, however, that no recovery is permitted for illness or bodily harm caused solely by harm or peril to a third person, unless the negligence of the actor has created an

unreasonable risk of bodily harm to the plaintiff. The plaintiff must be within the "zone of danger." The comment to the Restatement section adds that recovery is permissible only when "the actor threatens the other with emotional distress likely to result in bodily harm because of the other's fright, shock, or other emotional disturbance arising out of fear for his own safety, or the invasion of his own interests." Applying this comment, Johnson v. Rogers thus stands for the idea that recovery for negligently inflicted emotional distress is permitted only when the defendant actually endangers the plaintiff.

The rationale behind the zone-of-danger rule is that there must be limitations on who may recover for a defendant's negligence. To allow any person who witnesses an accident to recovery from a negligent party for emotional distress is unworkable and impracticable. Tobin v. Grossman, 249 N.E.2d 419 (N.Y. 1969).

Other states which apply the zone of danger rule adhere to the requirement that the plaintiff must be in physical danger to recover under the "zone of danger" rule. In James v. Harris, 729 P.2d 986 (Colo. App. 1986), the Colorado Court of Appeals held that the plaintiff could not recover for infliction of emotional distress caused by watching her daughter be struck by the defendant's car. As in this case, the plaintiff was not [in any] way subjected to any risk of harm, let alone an unreasonable risk of harm, and therefore was outside the zone of danger.

Similarly, a New York appeals court denied recovery for infliction of emotional distress to a father whose son was killed by the hospital's negligence. Schram v. Herkimer Memorial Hospital, 496 N.Y.S.2d 577 (App. Div. 1985). The court stated, "In order for plaintiff to prevail there must be a showing that defendants' negligence exposed plaintiff to an unreasonable risk of bodily injury or death, contemporaneously with the observation of serious injury or death of a member of his

immediate family." Id. at 577. Again, the father was not within the zone of danger, and could not recover for negligent infliction of emotional distress.

Finally, in Whetham v. Bismarck Hospital, the Supreme Court of North Dakota denied recovery for infliction of emotional distress to a mother who watched a nurse drop her child to the floor. 197 N.W.2d 678 (N.D. 1972). The court held that the plaintiff could recover only if the defendant's negligent act had threatened the plaintiff herself.

In this case, it is undisputed that plaintiff Linda Hansen was not physically endangered by any alleged negligence of the defendants. Consequently, she cannot meet the requirements of the zone-of-danger rule, and her claims should be dismissed.

For those reasons, Linda Hansen's claims fail as a matter of law, and should be dismissed.

DATED this 28th day of September, 1989.

CHRISTENSEN, JENSEN & POWELL, P.C.

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FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

Oct 26 1989
Markus B. Zimmer,
Clerk
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

MONTE C. HANSEN, et al.,

Plaintiffs,

-vs-

SEA RAY BOATS, INC., a Tennessee corporation, et al.,

Defendants.

AFFIDAVIT OF LINDA HANSEN

Case No. 88-C-708G

Linda Hansen being first duly sworn upon her oath deposes and states as follows:

1. I am the plaintiff in this action against whom defendants are currently seeking summary judgment.

2. When the accident which is the subject matter of this

litigation occurred I was situated on the rear deck of our Sea Ray cruiser, which was docked in the Wahweap Marina at Lake Powell.

3. From that position I observed my son Monte Travis suddenly lose his ability to swim when he was a few feet from the stern of the boat and begin to sink in the water.

4. I had no idea that electricity was the cause of my son's difficulty until later, and for that reason did not specifically fear electrical shock to myself.

5. Although I am a non-swimmer and deathly afraid of the water, I prepared to go in the water and attempt a rescue. Just as I was going in someone or something told me subconsciously not to jump as my presence in the water would interfere with my son's rescue. I believe it was my fear for my own safety that kept me from going in.

6. While I was in the boat and preparing to jump in the water, I was within inches of the water, which I now realize was charged with electricity because of electrical defects in the boat.

7. During the incident I witnessed three of our party in the water within a few feet of my position who were incapacitated and apparently dead or dying.

8. During that sequence of events I feared for my own safety, although I was not certain until later exactly what the danger was. I knew something was terribly wrong and was causing serious harm to my son and the others who were near me. Had I known that the victims' problems were being caused by electrical shock, my fear would certainly have been of electrical shock. I was in fact afraid for myself, although my fear was of a general nature and not specifically directed to the possibility of receiving an electrical shock.

9. I have since the incident learned that its cause was an electrically charged field in the water surrounding our boat which incapacitated those entering or reaching into it. I was within inches and came within an instant of entering the water in a rescue attempt while I was in a state of fear both for my own safety and that of my son Monte Travis.

10. The emotional trauma which I experienced during the incident has caused me physical injury and illness for which medical care has become necessary.

11. I now know that I was in fact within the "zone of danger" created by our boat's electrical defect since I was in the boat, which was surrounded by the electrically charged water and literally within inches of the water.

DATED this 26th day of October, 1989.

/s/ Linda Hansen
LINDA HANSEN

STATE OF UTAH)
: ss.
County of Salt Lake)

SUBSCRIBED and SWORN to before me this 26th day of October, 1989.

/s/ Judith Terry
NOTARY PUBLIC, residing at
Salt Lake County

My Commission Expires:

_____

[SEAL]
NOTARY PUBLIC
STATE OF UTAH

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-4252

LINDA K. HANSEN,

Appellant, Petitioner

v.

SEA RAY BOATS, INC.,

Appellees/Respondents.

PETITION FOR REHEARING

Petitioner Linda K. Hansen, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, hereby petitions the Court for rehearing of the above matter on grounds and for reasons as more fully set forth below.

GROUNDS FOR REHEARING

Petitioner submits that the Court has overlooked or misconstrued the fundamental and critical issue presented in Linda K. Hansen's brief on this appeal concerning the lower court's initial consideration and eventual grant of summary judgment in favor of the Defendants. Mrs. Hansen's opening argument in her brief on appeal concerned whether the Defendants had satisfied the requirements of Rule 56 of the Federal Rules of Civil Procedure by setting forth each fact to which it contended no genuine dispute existed and as properly supported by references to the record. Mrs. Hansen further asserted that, assuming Defendants' burden was established, there remained genuine issues established by her affidavit that were unrefuted by the Defendants.

There was a sufficient record created in the lower court for this Court's review of that issue in order to demonstrate that the lower court committed reversible error by granting summary judgment. Alternatively, Mrs. Hansen submitted affidavit testimony to oppose Defendants' mere inferences. The record upon which Mrs. Hansen relies on appeal is no greater than that relied upon by the lower court at the summary judgment level.

For the reasons stated below, the Court should review this matter in light of the argument as intended in Mrs. Hansen's brief on appeal, and accordingly find that the lower court erred as a matter of law under Rule 56 of the Federal Rules of Civil Procedure, and that Mrs. Hansen raised sufficient facts through her affidavit to defeat Defendants' motions for summary judgment.

POINT I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT ON THE CLAIMS OF LINDA K HANSEN

Petitioner notes the Court's apparent refusal to consider Mrs. Hansen's first point on appeal on the basis of a failure to include a complete copy of Mrs. Hansen's deposition, and therefore a complete review of the record was not afforded to this Court.

Mrs. Hansen did not request appellate review of the entire record to determine correctness of the lower court's ruling on the merits as a whole, but, rather, whether the evidence submitted and relied upon by the lower court was sufficient under Rule 56, F.R.C.P. Petitioner submits that the entire deposition of Mrs. Hansen was not essential on appellate review since none of the Defendants included a copy with their motions and it was never submitted to the lower court for its consideration of the motions for summary judgment.

In short, a copy of the entire deposition transcript is of no moment for purposes of the appeal, which questioned whether the limited portion relied upon and quoted by the Defendants initially would amount to sufficient evidence to satisfy the requirements of Rule 56 to establish the non-existence of material facts. Furthermore, assuming the initial burden had been met, the lower court did, in fact, consider that the affidavit of Mrs. Hansen was sufficient to raise reasonable conclusions opposing the Defendants arguments.

A. DEFENDANTS FAILED TO SATISFY THEIR BURDEN TO DEMONSTRATE THE NONEXISTENCE OF MATERIAL FACTS.

On September 28, 1989, Defendant Southwest Marine

moved for summary judgment against the claims of Linda Hansen. Southwest Marine argued two points to the lower court contending that summary judgment was proper: (1) that "**Ms. Hansen was never physically threatened by the defendants' alleged conduct [stray electricity];**" and (2) that "**she never feared for her own safety**" Id. In its supporting memorandum, Southwest Marine stated as "Facts Necessary for Summary Judgment" that "Ms. Hansen admits that she was not in danger of receiving an electrical shock, and that she did not fear for her own safety," and quoted the following from Mrs. Hansen's deposition:

Q. I take it that you were never shocked, is that right?

A. No. I was not in the water.

Q. And I take it –

MR. DUNN: And you were not shocked?

THE WITNESS: No. I was not shocked.

Q. (BY MR. WINEGAR) I take it that you never were in fear of being shocked?

A. No.

The deposition was neither attached to the supporting memorandum, nor ever submitted in its entirety to the lower court. As far as Mrs. Hansen is aware, the deposition remained in the possession of defense counsel. The above-quoted section of Mrs. Hansen's deposition is the only part of the "record" relied upon by the Defendants at the time the motion for summary judgment was filed.

Defendants, however, also argued by way of counsels'

interpretation of the deposition statement that **"Plaintiff Linda Hansen admits that she was not electrically shocked at the time of the accident, nor at any time did she fear being shocked."** and further that **"[d]uring the time of the alleged shock, Linda Hansen was safely in the boat, ..."**

Defendant Professional Mariner, joining in the motion of Southwest Marine suggested:

The plaintiff was never in any danger because she did not attempt to rescue her son and she remained in the boat where there was no danger of electrical shock. In this case, the line marking the "zone of danger" was the water. The plaintiff did not cross that line.

The Defendants' arguments in support of summary judgment were fatally defective for several reasons. The only admissible "evidence" relied upon by the Defendants was the limited statement from Mrs. Hansen's deposition. Her testimony on the subject did not state that she did not ever fear from electricity or that she was not threatened by it, she merely stated that she did not receive a direct electrical shock, or did she fear being shocked simply because she did not enter the water or contact those who were in the water [sic]. Defendants merely quoted that portion of the deposition and extrapolated a meaning that remained in dispute.

The limited portion of the deposition testimony was subject to wide interpretation by the parties, and was simply construed by the Defendants as meaning that Mrs. Hansen never had any fear of any kind and had no reason to be fearful since she was safely in the boat. The notion of having no fear was premised upon the Defendants' suggestion that only the water was energized with electricity, and, therefore, Mrs. Hansen was in a safe place and thus no reasonable basis for fear existed.

Defendants offered no evidence to support the bare contentions, and were merely arguments of defense counsel. The only admissible evidence available to the lower court was the limited deposition statement and Mrs. Hansen's affidavit. The lower court's consideration of counsel's statements interpreting admissible evidence was inappropriate.

The issue of whether the boat was safe or not was greatly disputed, and was a matter squarely addressed to the lower court at the time. Despite having expert witnesses available, no affidavits were submitted by Defendants to support the respective motions for summary judgment. None of the Defendants produced any evidence or affidavits to support its [sic] original claim on summary judgment that the boat was the safest place for Mrs. Hansen, or any other person to be. The lower court accepted as true counsels' argument that the boat was a safe place, without any evidence to support it or reference to the record.

The Defendants had the initial burden of showing the absence of a genuine issue concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party's burden may be met by identifying those portions of the record demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

The above standard imposed upon the lower court a duty to first assure that the Defendants met their burden by demonstrating the absence of a genuine issue of **any** material fact concerning Mrs. Hansen's fear and whether she was safe on the boat. The moving party must, **at least**, identify those portions of the record demonstrating no fact remains in dispute as to that issue. Id.

Furthermore, when determining whether the Defendants met their initial burden, the lower court had a duty to examine any such evidence in a light most favorable to the non-moving party, Mrs. Hansen. Barber v. General Electric Co., 648 F.2d 1272 (10th Cir. 1981).

The inferences raised by the Defendants to the lower court

were three-fold: (1) the deposition statement meant that Mrs. Hansen was never in fear for her own safety from an electrical shock; (2) that Mrs. Hansen never feared for her own safety since she was safely on the fiberglass boat; and (3) when Mrs. Hansen learned of the danger confronting the others, her fear was based upon the threat to the other individuals and not to herself.

On the other hand, Mrs. Hansen's assertions to the lower court were directly contrary to those inferred by the Defendants: (1) that Mrs. Hansen was not in fear of being shocked only until she learned that electricity was present on the boat; (2) the area of the boat where Mrs. Hansen was located produced an electrical shock to one of the other individuals; and (3) after learning that electricity was present, she jumped from the boat out of fear for her own safety.

Despite the divergence of opinion and interpretation by the parties concerning whether Mrs. Hansen was in fear for her own safety and whether she was threatened from the stray electricity, those inferences were ultimately construed against Mrs. Hansen. The lower court thereafter entered its conditional order granting summary judgment, unless Mrs. Hansen sought certification on the issue of fear and the zone of danger. That "Order" unequivocally stated the lower court's opinion and ruling that the Defendants had prevailed on the matter of summary judgment. Despite the divergence of the arguments presented and the available admissible evidence, summary judgment was eminent [sic].

In that respect, the lower court erred by acting as a fact-finder determining that there were no genuine issues of fact concerning whether Mrs. Hansen feared for her own safety and that her presence on the boat caused no threat of harm [sic]. Furthermore, the lower court's opinion at that time appeared to contradict its own statements made during oral argument, including its comment in a hearing held on December 67, 1989:

THE COURT: Well you feel you need to establish

both of those points. Suppose I were to determine as I think I easily could at this point that there was a reasonable basis for fear. . . . [Emphasis added].

and, on August 29, 1990:

THE COURT: Well the rule really ought to be and in just about two minutes I think will be that if a person ought to fear that takes care of the fear question.

The lower court was obviously inclined to deny the motions for summary judgment on the issue of fear given the inferences that Mrs. Hansen feared electricity after learning of its presence. Even defense counsel acknowledged the fear that arose at the time Mrs. Hansen become aware of electricity:

MR. WINEGAR: well I think even under those circumstances what fear Mrs. Hansen had or should of had for her own safety, for her son's safety.

Yes, she should have feared and properly did so, but for her own safety. Not only did she not fear she admitted it but she shouldn't have feared because there was nothing to fear. She testified at first she wasn't even aware of the electricity and I think that's –

THE COURT: Well what was she running around the countryside to get help for if she wasn't aware of any problem?

MR. WINEGAR: She's there to get help for her son.

THE COURT: But she was aware of a problem.

MR. WINEGAR: Yes. . . .

Despite the clarifications by the lower court and

challenges to defense counsel's representations, the lower court disregarded its concerns and drew all inferences in favor of the defendants. The lower court was at that time weighing the available evidence and determining the facts, and therefore erred. Windon Third Oil and Gas v. Federal Deposit Ins., 805 F.2d 342, 346 (10th Cir. 1986), cert. denied, 480 U.S. 947, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987) [court cannot act as the jury and determine credibility, weigh the evidence, or decide upon competing inferences]. For those reasons alone, the lower court committed reversible error.

B. MRS. HANSEN'S AFFIDAVIT REFUTED DEFENDANTS' INFERENCES.

Assuming, arguendo, that the burden on summary judgment shifted to Mrs. Hansen, she should have nevertheless prevailed by reason of her affidavit submitted to refute the contentions made by defense counsel that she did not fear for her own safety. Mrs. Hansen's affidavit provided, in part:

> 8. During the sequence of events **I feared for my own safety**, although I was not certain until later exactly what the danger was. I knew something was terribly wrong and was causing serious harm to my son and the others who were near me. Had I known that the victims' problems were being caused by electrical shock, my fear would certainly have been of electrical shock. **I was in fact afraid for myself**, although my fear was of a general nature and not specifically directed to the possibility of receiving an electrical shock. [Emphasis added].

With regard to the affidavit of Mrs. Hansen, the lower court recognized it as being sufficient to establish that Mrs. Hansen did, in fact, fear for her own safety. Not only did the lower court recognize the disputed fact concerning Mrs.

Hansen's fear, but so did the Defendants:

> **THE COURT; Doesn't she say in her affidavit she had fear of a general nature?**
>
> **MR. WINEGAR: Yes, she did. She had fear of a general nature –**
>
> **THE COURT: Not something that she now says I should have fear, but she said I did have fear of a general nature.**
>
> **MR. WINEGAR: That's right and we don't dispute that it was a fearful thing, but the law says she has to fear for her own safety reasonably.**
>
> **THE COURT: Well she says that in her affidavit. It reasonably is a conclusion.**

The lower court's comments, and those of defense counsel demonstrate that the affidavit sufficiently addressed Mrs. Hansen's fear, and moreover, that it "reasonably is a conclusion" that she had fear for her own safety. Based upon the record before the lower court as of April 5, 1990, genuine issues of material fact remained concerning whether (1) Mrs. Hansen feared for her own safety, and (2) whether she was physically threatened with harm.

There was no admissible evidence before the court to establish that Mrs. Hansen was never threatened with harm from electricity. The only inferences suggested by defense counsel were that she was safe being on the board, and she did not receive an electrical shock. The fact that she did not receive an electrical shock is not an element under the zone of danger test. A direct shock constitutes an "impact" or direct injury. It is of no consequence in this setting.

Irrespective of the deposition statement relied upon by the defendants, Mrs. Hansen's affidavit put to rest the issue of whether she had personal fear, which the lower court accepted as true and reasonable, and as conceded by the Defendants.

C. THE LOWER COURT FAILED TO ADHERE TO THE LEGAL STANDARDS FOR SUMMARY JUDGMENT.

Mrs. Hansen maintains that the lower court committed error by failing to apply the well-established standards governing motions for summary judgment. First, summary judgment is appropriate only where the record, taken as a whole, could lead no rational trier of fact to find in non-movant's favor. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

The available admissible evidence included only the limited quotation from the deposition and the affidavit of Mrs. Hansen. The lower court concluded that the affidavit sufficiently stated a reasonable conclusion that Mrs. Hansen actually feared for her own safety. Despite its statement to that effect, the lower court apparently disregarded the admissible evidence. Furthermore, the lower court addressed the Defendants' challenge that the affidavit was contradictory to the deposition testimony, and stated:

> **THE COURT: Well plaintiff can always file an affidavit to oppose a motion for summary judgment. Indeed, that's what a person better do unless they want to get some rulings of law immediately, but there is law and I think it's what you're talking about to the effect that a court isn't necessarily bound to accept an affidavit that is a contradiction of previous deposition testimony.**

This doesn't seem to be in terms of the general fear. She wasn't - she didn't testify that she didn't have any general fear of her own safety. She said, I had no fear of being shocked.

In that regard, the lower court determined that the affidavit was not inconsistent with the deposition statement that Mrs. Hansen did not fear from being shocked. The affidavit statement was clear that Mrs. Hansen stated that she had fear for her own safety once she learned of the presence of the electricity. The distinction was apparent to the lower court, but eventually ignored.

With respect to the established standard, "[w]here different inferences can be drawn from conflicting affidavits, depositions and pleadings, summary judgment should not be granted." United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962).

The trial judge "must construe all pleadings, affidavits, and depositions liberally in favor of the party against whom the motion is made." City Consumer Serv. Inc. v. Horne, 578 F.Supp. 283, 288 (D. Utah 1984) (citing Adickes v. S.H. Kress Co., 398 U.S. 144, 157-59, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970)). A genuine issue for trial remains if there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party, or lack of evidence presented by the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Accordingly, if doubt arises regarding any issue, the court must resolve the doubt in favor of the nonmovant and deny the motion. Id.

The well established [uniform] standard required the lower court to evaluate all inferences in a light most favorable to Mrs. Hansen. This means that the court was obligated, absent

evidence to the contrary, to consider the boat was not a safe place to be, and based upon Mrs. Hansen's affidavit that she feared for her own safety. The court was required to consider the inference that Mrs. Hansen feared for her own safety and was threatened by actual harm from the electricity. The fact that she did not receive an electrical shock is not an element required under the zone of danger rule in Utah. See Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

Simply stated, the burden imposed upon the defendants was not met, and summary judgment, from its inception in this case, should not have been entered by the lower court, conditionally or otherwise. There were clearly issues of fact which remained for the fact-finder. Any question whether Mrs. Hansen feared for her own safety and whether she was threatened with actual harm were issues of fact addressed directly by affidavit.

The movant's burden under Rule 56 of the federal Rules of Civil Procedure is to lay out the basis of its motion and to "point to those portions of the record that demonstrate an absence of a genuine issue of material fact given the relevant substantive law." Stover v. Eagle Products, Inc., 896 F.Supp. 1085 (D.Kan. 1995) citing Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024 (10th Cir.), cert. denied, --- U.S. ---, 113 S.Ct. 635, 121 L.Ed.2d 566 (1992). Moreover, the purpose of summary judgment is not to afford the court the chance to act as the jury and determine witness credibility, weight the evidence, or decide upon competing inferences. Windon Third Oil and Gas v. Federal Deposit Ins., 805 F.2d 342, 346 (10th Cir. 1986), cert. denied, 480 U.S. 947, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987).

In this matter, the lower court clearly acted as the jury to determine and elect what inferences it chose to believe. The most predominant position made by the lower court was its acknowledgment that Mrs. Hansen's affidavit sufficiently set

forth a reasonable conclusion that she feared for her own safety. There was no admissible evidence concerning whether the boat was safe, and because the Defendant raised that issue, it was their burden to put forth evidence. They did not. Stover, supra.

Appellant submits that the lower court failed to apply any of the above standards. The statements proffered by Defendants' counsel were nothing more than supposition they conceived of the events on the day of the accident. Arguments of counsel do not constitute admissible evidence. The specific time when Mrs. Hansen jumped off of the boat was never argued to the lower court and the route she took was never explored. Defendants suggested that she only jumped off to get help, but even the lower court recognized an element of fear existed to prompt Mrs. Hansen's retreat from the boat.

The bottom line is that all of these inferences were always viewed as against Mrs. Hansen, which is contrary to the standards for summary judgment. Based upon all of the inferences it was the Defendants' initial burden to establish that the boat was safe. No evidence was offered.

One final matter of significance was the Defendants' claim that Mrs. Hansen was never in a position on the boat to fear receiving an electrical shock. Contrary to the suggestion of counsel, Mrs. Hansen jumped from the boat at a place where others received an electrical shock. In that regard, it was again the Defendants' burden to establish the suggestion that Mrs. Hansen jumped off the boat to get help rather than being motivated by fear. No evidence was offered other than a xerox copy of a picture of the boat and a suggestion that Mrs. Hansen's exit was other than on and over the swim platform. It was physically impossible for anyone to exit the boat other than through the cut-away in the stern, onto the swim platform, and onto the dock. It was conceded that the swim platform was in the zone of danger according to the Defendants.

The lower court committed reversible error a second time by failing to accord deference to the affidavit of Mrs. Hansen which refuted the Defendants' inferences.

CONCLUSION

Petitioner submits that this Court has failed to consider or overlooked her initial request for appellate review on the most critical point raised in her brief. Ignoring the fundamental error compounds the long-standing injustice in this matter. Each event which transpired after the initial motions for summary judgment were prompted by the lower court's continued compulsory errors. The lower court proceedings in this regard are a house of cards built upon a weak foundation arising from an erroneous initial impulse to grant summary judgment with no evidence or reasonable inference to support it. Despite the lower court's indication that the affidavit of Mrs. Hansen adequately stated a disputed fact, as conceded by Defendants, summary judgment was conditionally entered by the lower court against Mrs. Hansen. The lower court improperly acted as jury and determined the facts as it saw fit.

For the reasons stated Mrs. Hansen respectfully requests that the Court rehear this matter limiting itself to the initial moment the motions for summary judgment were brought by the Defendants. The record in that respect is complete and provided in the Appellant's Appendix, and as argued in her principal brief on appeal.

DATED this 6th day of March, 1997.

/s/ David A. McPhie
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IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MONTE C. HANSEN, LINDA K. HANSEN,	)	SEA RAY'S ANSWER TO PETITION FOR REHEARING
Plaintiffs,	)	
vs.	)	Case No. 94-4252
SEA RAY BOATS, INC., SOUTHWEST MARINE, PROFESSIONAL MARINER, NEWMARK PRODUCTS, INC.,	)	
Defendants.	)	

Defendant/Respondent, Sea Ray Boats, Inc., by and through its attorneys of record, as directed by the Court, respectfully submits the following answer to the petition for rehearing of Linda K. Hansen:

A.

Mrs. Hansen's petition ignores the obvious. Her case against Sea Ray, at least on liability, stood on the same footing as that of the other plaintiffs. In other words, Sea Ray's duty to

prevent the emotional distress of Mrs. Hansen was no greater than its duty to prevent the physical injuries of the other plaintiffs. When the jury ruled against plaintiffs on their claims for physical injuries, it would have ruled against Mrs. Hansen on her claim for emotional distress, if her claim had been in the case.

This Court has affirmed the jury's verdict in finding "no liability" against Sea Ray. That ruling must, as a practical matter at least, be binding on Mrs. Hansen. If the district court committed error in dismissing Mrs. Hansen's claim for emotional distress, which Sea Ray denies, all it means is that she would have lost her case along with the other plaintiffs. If Sea Ray was not liable for the physical injuries produced by the electricity in the water, it certainly had no liability to Mrs. Hansen who merely witnessed the event.

B.

There is no recovery for emotional distress, under Restatement (Second) of Torts, § 313(1), which arises solely from a threat of harm to others. Mrs. Hansen concedes that her fear (or emotional distress) was induced by the threat of harm to others. In other words, she did not begin to fear, for herself or others, until after the effect of the electricity became apparent upon those in the water. "Fear for one's own safety" is relevant only to recovery under Subsection (1). Restatement, § 313, comment d. Since Mrs. Hansen never had recovery under Subsection (1), her fear was immaterial.

For Mrs. Hansen to recover, she would have to demonstrate, under Subsection (2), that "the negligence of [Sea Ray] has otherwise created an unreasonable risk of bodily harm to [Mrs. Hansen]." Restatement, § 313(2). The material issue is and always was whether Sea Ray placed Mrs. Hansen in danger of receiving an electrical shock.

Defendants thought her deposition testimony (that she

was in no fear of receiving an electrical shock) was sufficient to answer the question of "fear" under Section 313(1); and the question of "unreasonable risk of bodily harm" under Section 313(2). As it turned out, Mrs. Hansen supplemented that proof with her own Affidavit; her Memorandum in Opposition to defendants' Motions for Summary Judgment; and the admissions of her counsel at the original hearing of the Motions.

What Mrs. Hansen told the district court was that if she stayed where she was, she would have been in no physical danger. Mrs. Hansen admitted that while she gave some thought to a rescue, she decided against it. She purposefully did not come into contact with any of the persons in the water. Since that is where the threat of harm lay, Mrs. Hansen was perfectly safe. For this, the district court did not have to rely on Mrs. Hansen's deposition testimony alone.

It is of no moment that some of these materials were submitted by Mrs. Hansen. Rule 56(e) (FRCP) merely requires that a motion for summary judgment be "made and supported" by some such material, which of course it was. Rule 56(c) says that summary judgment shall be rendered if all the materials, not necessarily those submitted by the movant, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

There is no authority for the contention (pg. 6 of Mrs. Hansen's petition), that the district court had "a duty to first assure that the Defendants had met their burden by demonstrating the absence of a genuine issue of any material fact...." In fact, Mrs. Hansen's position is contravened by the very case she cites in support, Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986). In doing so, the Court explained and limited the holding of the other case cited by Mrs. Hansen, Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1970): "[W]e do not think the Adickes language quoted above should be construed to

mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead,...the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." 106 S.Ct. at 2554.

The Supreme Court's position on this matter was made plain on the preceding page: "The import of these subsections [56(c) & (e)] is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." 106 S.Ct. at 2553 (emphasis added).

All Sea Ray and the other defendants were required to do was point to something in the record suggesting an "absence of evidence to support the nonmoving party's case." 106 S.Ct. at 2554. Once that was done, it was up to Mrs. Hansen to produce evidence showing a genuine issue of material fact on that issue. Presumably, that is what Mrs. Hansen attempted to do with her Affidavit, Memorandum and admissions of counsel. It cannot be helped that they had the opposite effect. The district court was permitted to consider those materials, in addition to those presented by defendants, in making its determination that no genuine issue existed as to Mrs. Hansen's presence in the zone of danger.

In her petition (pg. 14), Mrs. Hansen raises an old argument: That there were "others" who received an electrical shock, who were not in the water. Mrs. Hansen made no mention of this in the briefing before this Court. The reason is clear: There is no "evidence" in the record of this appeal supporting her

claim. What she refers to is the "argument" of her counsel at one of the many hearings before the district court. Mrs. Hansen should remember what she said on pg. 14 of her petition: "Arguments of counsel do not constitute evidence."

Even this non-evidence does not help. The two people she is referring to were standing on the swim platform on the rear of the boat. The swim platform is a fiberglass platform suspended from the rear of the boat, outside the main body of the boat, in direct contact with the water behind the boat. Those persons on the swim platform were assisting swimmers from the water. That is why they received a shock; they were in contact with people who were in the energized water. This is evident from another piece of argument cited by Mrs. Hansen.

None of this matters. As long as Mrs. Hansen did not attempt a rescue, she was safe from electrical shock. Even if she passed over the swim platform on her way off the boat, which is not supported by any evidence in this record, she did not stop to lend a hand with those who were in the water. This is why the district court concluded that she was in no real, physical danger. There is no evidence, in the record before this Court, to suggest otherwise.

Even if there were, Mrs. Hansen's claim would have suffered the same fate as those of the other plaintiffs. If Sea Ray were not responsible for electricity being in the water, it could not possibly be responsible for Mrs. Hansen's fear. Accordingly, and for all the foregoing reasons, the Court should deny Mrs. Hansen's petition for rehearing.

DATED this 8th day of April, 1997.

VAN COTT, BAGLEY,
CORNWALL & McCARTHY

By /s/ Donald L. Dalton
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Ray Boats, Inc.